

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

DANIEL LAUFENBERG,) Case No. CV 15-7927-JPR
)
 Plaintiff,)
) **MEMORANDUM DECISION AND ORDER**
 v.) **AFFIRMING COMMISSIONER**
)
CAROLYN W. COLVIN, Acting)
Commissioner of Social)
Security,)
)
 Defendant.)
)

I. PROCEEDINGS

Plaintiff seeks review of the Commissioner's final decision denying his application for Social Security disability insurance benefits ("DIB"). The parties consented to the jurisdiction of the undersigned U.S. Magistrate Judge under 28 U.S.C. § 636(c). The matter is before the Court on the parties' Joint Stipulation, filed June 3, 2016, which the Court has taken under submission without oral argument. For the reasons stated below, the Commissioner's decision is affirmed.

1 **II. BACKGROUND**

2 Plaintiff was born in 1958 (Administrative Record ("AR")
 3 121), graduated college and law school (AR 226), and worked as an
 4 attorney in "the early 1990s" (AR 49-50, 138-39).

5 On April 1, 2012, Plaintiff applied for DIB, alleging that
 6 he had been unable to work full time since November 13, 1998,
 7 because of degenerative disc disease and chronic pain. (See AR
 8 46-47, 121-22, 134.) His last insured date was December 31,
 9 2001. (AR 25.) After his application was denied initially and
 10 on reconsideration, he requested a hearing before an
 11 Administrative Law Judge. (AR 54-56, 66-67.) A hearing was held
 12 on April 8, 2013, at which Plaintiff, who represented himself,
 13 appeared and testified. (AR 42, 44.) No expert witnesses
 14 appeared at the hearing (see AR 42); instead, the ALJ obtained
 15 expert testimony by propounding posthearing interrogatories to a
 16 vocational expert (AR 225) and sending questionnaires to two
 17 medical experts (AR 498-513). The ALJ issued an unfavorable
 18 decision on September 9, 2013, finding that Plaintiff was not
 19 disabled as of his date last insured. (AR 25, 31.) Plaintiff
 20 requested review from the Appeals Council, and on April 23, 2015,
 21 it denied review. (AR 15-17, 18.) This action followed.

22 **III. STANDARD OF REVIEW**

23 Under 42 U.S.C. § 405(g), a district court may review the
 24 Commissioner's decision to deny benefits. The ALJ's findings and
 25 decision should be upheld if they are free of legal error and
 26 supported by substantial evidence based on the record as a whole.
 27 See id.; Richardson v. Perales, 402 U.S. 389, 401 (1971); Parra
 28 v. Astrue, 481 F.3d 742, 746 (9th Cir. 2007). Substantial

1 evidence means such evidence as a reasonable person might accept
 2 as adequate to support a conclusion. Richardson, 402 U.S. at
 3 401; Lingenfelter v. Astrue, 504 F.3d 1028, 1035 (9th Cir. 2007).
 4 It is more than a scintilla but less than a preponderance.
 5 Lingenfelter, 504 F.3d at 1035 (citing Robbins v. Soc. Sec.
 6 Admin., 466 F.3d 880, 882 (9th Cir. 2006)). To determine whether
 7 substantial evidence supports a finding, the reviewing court
 8 "must review the administrative record as a whole, weighing both
 9 the evidence that supports and the evidence that detracts from
 10 the Commissioner's conclusion." Reddick v. Chater, 157 F.3d 715,
 11 720 (9th Cir. 1998). "If the evidence can reasonably support
 12 either affirming or reversing," the reviewing court "may not
 13 substitute its judgment" for the Commissioner's. Id. at 720-21.

14 **IV. THE EVALUATION OF DISABILITY**

15 Claimants are "disabled" for purposes of receiving Social
 16 Security benefits if they are unable to engage in any substantial
 17 gainful activity owing to a physical or mental impairment that is
 18 expected to result in death or has lasted, or is expected to
 19 last, for a continuous period of at least 12 months. 42 U.S.C.
 20 § 423(d)(1)(A); Drouin v. Sullivan, 966 F.2d 1255, 1257 (9th Cir.
 21 1992).

22 A. The Five-Step Evaluation Process

23 The ALJ follows a five-step sequential evaluation process to
 24 assess whether a claimant is disabled. 20 C.F.R.
 25 § 404.1520(a)(4); Lester v. Chater, 81 F.3d 821, 828 n.5 (9th
 26 Cir. 1995) (as amended Apr. 9, 1996). In the first step, the
 27 Commissioner must determine whether the claimant is currently
 28 engaged in substantial gainful activity; if so, the claimant is

1 not disabled and the claim must be denied. § 404.1520(a)(4)(i).

2 If the claimant is not engaged in substantial gainful
3 activity, the second step requires the Commissioner to determine
4 whether the claimant has a "severe" impairment or combination of
5 impairments significantly limiting his ability to do basic work
6 activities; if not, the claimant is not disabled and his claim
7 must be denied. § 404.1520(a)(4)(ii).

8 If the claimant has a "severe" impairment or combination of
9 impairments, the third step requires the Commissioner to
10 determine whether the impairment or combination of impairments
11 meets or equals an impairment in the Listing of Impairments
12 ("Listing") set forth at 20 C.F.R. part 404, subpart P, appendix
13 1; if so, disability is conclusively presumed.

14 § 404.1520(a)(4)(iii).

15 If the claimant's impairment or combination of impairments
16 does not meet or equal an impairment in the Listing, the fourth
17 step requires the Commissioner to determine whether the claimant
18 has sufficient residual functional capacity ("RFC")¹ to perform
19 his past work; if so, he is not disabled and the claim must be
20 denied. § 404.1520(a)(4)(iv). The claimant has the burden of
21 proving he is unable to perform past relevant work. Drouin, 966
22 F.2d at 1257. If the claimant meets that burden, a *prima facie*
23 case of disability is established. Id.

24 The Commissioner then bears the burden of establishing that
25 the claimant is not disabled because he can perform other

27 ¹ RFC is what a claimant can do despite existing exertional
28 and nonexertional limitations. 20 C.F.R. § 404.1545; see Cooper
v. Sullivan, 880 F.2d 1152, 1155 n.5 (9th Cir. 1989).

1 substantial gainful work available in the national economy.
 2 § 404.1520(a)(4)(v); Drouin, 966 F.2d at 1257. That
 3 determination comprises the fifth and final step in the
 4 sequential analysis. § 404.1520(a)(4)(v); Lester, 81 F.3d at 828
 5 n.5; Drouin, 966 F.2d at 1257.

6 B. The ALJ's Application of the Five-Step Process

7 At step one, the ALJ found that Plaintiff had not engaged in
 8 substantial gainful activity from his alleged onset date of
 9 November 13, 1998, through his date last insured, December 31,
 10 2001. (AR 25.) At step two, he concluded that Plaintiff had
 11 severe impairments of "lumbar and cervical degenerative disc
 12 disease" (AR 25-26), but his "medically determinable mental
 13 impairments of depression" were "nonsevere" (AR 27). At step
 14 three, he determined that Plaintiff's impairments did not meet or
 15 equal a listing. (Id.)

16 At step four, the ALJ found that Plaintiff had the RFC to
 17 perform light work with the following additional limitations:

18 [he] cannot lift or carry more than 20 pounds
 19 occasionally and 10 pounds frequently[;] . . . cannot
 20 sit, stand, or walk longer than 6 hours in an 8-hour
 21 workday[;]² . . . requires a sit/stand option[;] . . . is
 22 limited to occasional reaching and operation of foot
 23 controls[;] . . . is precluded from climbing ladders or

24 ² The ALJ apparently meant that Plaintiff cannot sit, stand,
 25 or walk for more than six hours each in an eight-hour workday.
 26 (See AR 504 (Dr. Alpern's physical assessment noting that
 27 Plaintiff could sit, stand, or walk for two hours each "without
 28 interruption" and for a total of six hours each in an eight-hour
 workday); see also AR 29 (ALJ adopting "functional limitations of
 Dr. Alpern").)

scaffolds and limited to occasional climbing of stairs or ramps, balancing, stooping, kneeling, crouching, and crawling[; and] . . . is limited to occasional work around unprotected heights and moving mechanical parts.

5 (AR 27-28.) In determining Plaintiff's RFC, the ALJ relied on
6 the physical function assessment by Dr. Harvey Alpern, one of the
7 medical experts (AR 29), and discounted Plaintiff's subjective
8 testimony as "not credible" to the extent he alleged an
9 "inability to perform any work activity" (AR 28).³ Applying
10 Plaintiff's RFC, the ALJ found that he could not perform his past
11 relevant work as an attorney or legal instructor. (AR 29-30.)

12 At step five, the ALJ relied on the VE's written testimony,
13 finding that based on Plaintiff's RFC for limited light work, he
14 was able to perform "representative occupations" existing in
15 significant numbers in the national economy, including
16 (1) "surveillance system monitor," DOT 379.367-010, 1991 WL
17 673244, which was sedentary work, and (2) "gate guard," DOT
18 372.667-030, 1991 WL 673099, which was light work. (AR 30-31.)
19 Accordingly, the ALJ found him not disabled.

V. DISCUSSION

21 Plaintiff argues that the ALJ failed to (1) consider the
22 "opinion" testimony of his treating physician, Dr. Vernon
23 Williams, in evaluating the medical evidence; (2) account for Dr.
24 Alpern's restriction of a one-day-a-month work disruption; and
25 (3) resolve an apparent conflict between the VE's testimony and

³ Plaintiff does not challenge the ALJ's adverse credibility finding. (See generally J. Stip.)

1 the DOT regarding the sit/stand option. (See J. Stip. at 2, 4-6,
 2 9-10, 14-15.) For the reasons discussed below, remand is not
 3 warranted.

4 A. The ALJ Properly Accounted for Dr. Williams's Opinion
 5 in Assessing the Medical Evidence

6 Plaintiff argues that the ALJ failed to consider a
 7 transcript of Dr. Williams's opinion testimony from Plaintiff's
 8 divorce proceeding in October 2011. (J. Stip. at 4-6 (citing AR
 9 210).) The ALJ did not err.

10 1. Relevant background

11 a. *Dr. Williams's treatment of Plaintiff*

12 Plaintiff injured his neck and back in an automobile
 13 accident on November 13, 1998, resulting in two herniated disks
 14 in his neck.⁴ (AR 46, 208, 393-94.) In April 1999, he sought
 15 treatment at the Kerlan-Jobe Orthopaedic Clinic, which initially
 16 consisted of a conservative regime of physical therapy and
 17 narcotic and anti-inflammatory medications, but he subsequently
 18 opted for surgical intervention to alleviate his persistent arm
 19 and neck pain.⁵ (AR 208, 393-95.) After undergoing an anterior
 20 cervical discectomy and fusion and a posterior cervical in April
 21 2000 (AR 395), Plaintiff was referred to Dr. Williams, a pain-
 22 management specialist at the same clinic, for long-term care (AR
 23 185, 419-20).

24

25 ⁴ He had undergone a lumbar laminectomy in 1993 as a result
 26 of an unrelated automobile accident. (AR 46, 208.)

27 ⁵ Plaintiff also underwent arthroscopic ankle surgery in
 28 August 1999. (AR 208, 394.)

1 Dr. Williams first saw Plaintiff in November 2001⁶ and
 2 continued seeing him for follow-up "maintenance" visits every two
 3 to four months at least until 2011, mostly for refills of
 4 prescription medications and face-to-face counseling. (See,
 5 e.g., AR 185, 328-29, 421.) Dr. Williams's treatment for
 6 Plaintiff's chronic pain consisted primarily of pharmacotherapy –
 7 including prescribing primary analgesics, adjunctive medications,
 8 and opioids – to which Plaintiff responded positively.⁷ (See,
 9 e.g., id.; J. Stip. at 4 (noting that "pain medication became his
 10 primary treatment").) During the initial visit on November 30,
 11 2001, Dr. Williams found that Plaintiff's pain had been
 12 effectively controlled by medication,⁸ noting that "[t]o make the
 13 pain better, the patient rests and takes medication" (AR 420),
 14 and that his neck and upper-left-extremity pain was an eight on
 15 the pain scale "without medications" but "medications help calm
 16 it down to 4 or 5/10" (AR 421). Dr. Williams found in particular
 17 that Vicodin was "quite helpful" and "well tolerated" when taken
 18 "three or four times per week," as Plaintiff himself noted.

19

20 ⁶ As the Commissioner correctly indicates, Plaintiff started
 21 seeing Dr. Williams right before his date last insured, December
 22 31, 2001. (See J. Stip. at 6.)

22

23 ⁷ According to Dr. Williams, "primary analgesics" are pain
 24 medications whose primary function is to "reduce pain" – as in,
 25 "all they do is reduce pain" – whereas "adjunctive medications"
 26 have a non-pain-management purpose but may be prescribed for
 27 their secondary effect, "help[ing] to reduce pain." (See AR
 28 204.)

26

27 ⁸ At the time he was taking Vicodin, Fioricet, Elavil,
 28 Ambien, and Soma. (AR 419-20.) Dr. Williams discontinued Elavil
 for lack of effectiveness but put him on a trial of "Lidocaine
 patch." (AR 421.)

1 (Id.)

2 Subsequently, Dr. Williams would consistently note that
3 Plaintiff was benefiting from the "medication regimen,"
4 especially Vicodin and Lidoderm patches, and "tolerating the
5 medications without difficulty" (see AR 338; see, e.g., AR 334
6 (noting that Plaintiff "has been using [Lidoderm patches]," which
7 "have been quite effective for him"; his pain "certainly" would
8 "benefit (and has proven so) from the Lidoderm patch as it has a
9 significant analgesic benefit"), 415 ("He has been doing better
10 with using the medication on a scheduled dose basis.")), and
11 responding well to a TENS (transcutaneous electrical nerve
12 stimulation) unit and hot and cold treatment (see AR 232, 235).
13 (See, e.g., AR 293 (Dec. 11, 2007 note ("essentially status quo"
14 since last appointment, next appointment in eight weeks), 392
15 (Sept. 13, 2002 note ("essentially status quo and deni[ed]
16 significant interval change"), 511 (Dr. Anderson's medical
17 questionnaire concluding that Plaintiff "appears to be stable
18 with meds + TENS unit").) Subjective feedback from Plaintiff
19 confirmed the efficacy of Dr. Williams's medication regimen.
20 (See, e.g., AR 292, 314, 322, 329 (indicating that "pain
21 medications" were factor in decreasing or relieving pain); see
22 also AR 235 (listing "pain medications," hot and cold treatment,
23 and "TENS" as pain-relieving factors).)

24 Plaintiff experienced a setback in 2007, however, when he
25 decided – apparently against Dr. Williams's initial
26 recommendations (see AR 193, 203-04) – to "completely wean[]
27 himself off from narcotics" and primary analgesics, including
28 Vicodin, and instead rely solely on adjunctive medications for

1 pain management. (See, e.g., AR 289 (Mar. 25, 2008 note
 2 (Plaintiff appeared "visibly distressed" and "has completely
 3 weaned himself off from narcotics and is only using his
 4 Wellbutrin and lidocaine patches for pain in addition to recent
 5 addition of aspirin")), 307 (Oct. 8, 2007 note (Plaintiff no
 6 longer taking Vicodin and was "using Lidoderm patch at this time
 7 for pain")).)

8 b. *Dr. Williams's testimony in 2011*

9 On October 12, 2011, Dr. Williams appeared as a witness in
 10 Plaintiff's divorce proceeding and testified regarding his
 11 "lengthy pain management treatment of" Plaintiff.⁹ (J. Stip. at
 12 4; see AR 183, 185.) In relevant part, Dr. Williams was asked
 13 whether he thought Plaintiff could work at that time. (AR 192-
 14 95.) Dr. Williams suggested that Plaintiff could no longer work
 15 as an attorney or legal instructor because those professions
 16 required a "significant amount" of "high-level cognitive
 17 activities," which Plaintiff could not do given his "significant
 18 pain" and "an inability to sit for extended periods of time."
 19 (AR 193.) Dr. Williams cautioned, however, that Plaintiff's
 20 symptoms were in part caused by his decision in 2007 to
 21 "discontinue certain kinds of . . . analgesic medications" and
 22 "manage his pain without strong medications." (*Id.*)

23 Dr. Williams further indicated that he thought Plaintiff was
 24 not "totally disabled" and did not have a "100 percent
 25 disability." (AR 194.) Dr. Williams probably would not have
 26

27 ⁹ Dr. Williams appeared as a witness for Plaintiff's wife
 28 and was cross-examined by Plaintiff's attorney.

1 authorized a handicap placard for Plaintiff because he did not
 2 have to rely on "some type of assistive device for ambulation,"
 3 such as a wheelchair, walker, or cane. (AR 195-96.) Thus, Dr.
 4 Williams agreed that Plaintiff could perform "general [work]
 5 tasks" under certain conditions allowing him to "change positions
 6 frequently," "sit when necessary when he had intolerable pain or
 7 incapacitating pain," avoid "any heavy lifting, any repetitive
 8 bending and rotation of the neck or the lumbar spine," and have
 9 "some control over his environment . . . [to] manage the symptoms
 10 . . . [of] his spine disease." (AR 194, 210.)

11 When asked whether Plaintiff's "condition" had changed from
 12 2001 to 2011, Dr. Williams responded, "[y]es and no." (AR 196.)
 13 He explained that although there had been no "dramatic or
 14 significant change in diagnosis," Plaintiff had had "periods of
 15 time where he's had worsened pain as compared to other times,"
 16 which was "fairly common with chronic pain conditions." (Id.)

17 2. Applicable law

18 Three types of physicians may offer opinions in Social
 19 Security cases: (1) those who directly treated the claimant,
 20 (2) those who examined but did not treat the claimant, and
 21 (3) those who did neither. Lester, 81 F.3d at 830. A treating
 22 physician's opinion is generally entitled to more weight than an
 23 examining physician's, and an examining physician's opinion is
 24 generally entitled to more weight than a nonexamining
 25 physician's. Id.

26 This is so because treating physicians are employed to cure
 27 and have a greater opportunity to know and observe the claimant.
 28 Smolen v. Chater, 80 F.3d 1273, 1285 (9th Cir. 1996). If a

1 treating physician's opinion is well supported by medically
 2 acceptable clinical and laboratory diagnostic techniques and is
 3 not inconsistent with the other substantial evidence in the
 4 record, it should be given controlling weight. § 404.1527(c)(2).
 5 If a treating physician's opinion is not given controlling
 6 weight, its weight is determined by length of the treatment
 7 relationship, frequency of examination, nature and extent of the
 8 treatment relationship, amount of evidence supporting the
 9 opinion, consistency with the record as a whole, the doctor's
 10 area of specialization, and other factors. § 404.1527(c)(2)-(6).

11 When a treating physician's opinion is not contradicted by
 12 other evidence in the record, it may be rejected only for "clear
 13 and convincing" reasons. See Carmickle v. Comm'r, Soc. Sec.
 14 Admin., 533 F.3d 1155, 1164 (9th Cir. 2008) (citing Lester, 81
 15 F.3d at 830-31). When it is contradicted, the ALJ must provide
 16 only "specific and legitimate reasons" for discounting it. Id.
 17 (citing Lester, 81 F.3d at 830-31). Furthermore, "[t]he ALJ need
 18 not accept the opinion of any physician, including a treating
 19 physician, if that opinion is brief, conclusory, and inadequately
 20 supported by clinical findings." Thomas v. Barnhart, 278 F.3d
 21 947, 957 (9th Cir. 2002); accord Batson v. Comm'r of Soc. Sec.
 22 Admin., 359 F.3d 1190, 1195 (9th Cir. 2004).

23 3. Analysis

24 The ALJ properly assessed all the medical evidence,
 25 expressly referencing Dr. Williams by name and citing his
 26 treatment records from Kerlan-Jobe Clinic. (See, e.g., AR 26-27,
 27 29.) Even though the relevant disability period was between
 28 November 1998 and December 2001, the ALJ considered Plaintiff's

1 entire medical history – including all “records from the Kerlan-
2 Jobe Clinic cover[ing] the period August 1999 through March 2011
3 (Exhibit 1F).” (See AR 26-27; see also AR 24, 25 (noting
4 “careful consideration of all the evidence” and “entire
5 record”).) The ALJ’s summary of Dr. Williams’s extensive records
6 accurately reflected Dr. Williams’s view that Plaintiff’s pain
7 had been effectively managed by medication:

8 [C]onsistent with the weight of the medical evidence
9 [t]he claimant has a remote history of a back and
10 neck injury sustained in a motor vehicle accident 15
11 years ago. He underwent cervical fusion more than a
12 decade ago and has pursued only intermittent,
13 conservative care for spinal pain since that time. The
14 records from treating physician, Dr. Williams, show
15 multiple physical examinations over a period of more than
16 a decade with few physical findings. On the contrary,
17 Dr. Williams consistently reported normal orthopedic and
18 neurological findings and stated the claimant was doing
19 well. He treated the claimant symptomatically for
20 complaints of pain with a TENS unit and pain relief
21 medication. He did not assess any functional
22 limitations.

23 (AR 29.) Indeed, Plaintiff does not contest the ALJ’s assessment
24 of the medical evidence stemming from his treatment by Dr.
25 Williams.

26 The ALJ’s findings were entirely consistent with Dr.
27 Williams’s assessment and treatment records, including his
28 divorce testimony: that Plaintiff had severe physical impairments

1 but was not disabled and could still work with certain
2 restrictions. The ALJ's discussion of Plaintiff's specific
3 physical limitations in terms similar to those used by Dr.
4 Williams suggests that he was aware of and accounted for Dr.
5 Williams's opinion. (See AR 26-28; see also J. Stip. at 6
6 (Plaintiff acknowledging that "ALJ's RFC finding includes some
7 . . . limitations identified by Dr. Williams" in testimony).)
8 Because the ALJ is charged with summarizing the relevant medical
9 evidence and is not required "to discuss every piece of
10 evidence," Howard v. Barnhart, 341 F.3d 1006, 1012 (9th Cir.
11 2003), the ALJ did not err in assessing the medical evidence.

12 Plaintiff's contrary assertions fail. He faults the ALJ for
13 allegedly ignoring Dr. Williams's "opinion" testimony from
14 October 2011 regarding Plaintiff's functional limitations at that
15 time. (See J. Stip. at 5 ("ALJ did not address Dr. Williams's
16 opinion regarding functional limitations at AR 210[.]").) First,
17 Dr. Williams's assessment as to Plaintiff's ability to work in
18 October 2011 was only tangentially relevant to the ALJ's
19 determination of whether he was disabled before December 2001.
20 See Crane v. Shalala, 76 F.3d 251, 255 (9th Cir. 1996) (ALJ not
21 required to seek out treatment notes postdating relevant period
22 "after the insured status expired"); Hepp v. Astrue, 511 F.3d
23 798, 808 (8th Cir. 2008) (holding that "district court did not
24 err in refusing to remand [plaintiff]'s case to the Commissioner
25 for consideration of additional medical evidence," including
26 medical-opinion letter addressing his condition "four years after
27 his last date of coverage"). Although Plaintiff claims that Dr.
28 Williams said Plaintiff's impairments had not significantly

1 changed since 2001, in fact he testified only that Plaintiff's
 2 "diagnosis" had not dramatically or significantly changed; his
 3 symptoms had. (See AR 186, 196.) Indeed, given that Plaintiff's
 4 treating physicians at Kerlan-Jobe at one time assessed him as
 5 "temporarily totally disabled" (AR 426, 458) and later found that
 6 he could "continue working" or work "part-time" (AR 377, 385,
 7 391), his condition could not have remained the same from 2001 to
 8 2011.¹⁰

9 Second, as the doctor himself noted (see AR 193, 203-04),
 10 Plaintiff's decision to discontinue all narcotics medications in
 11 2007 was a significant intervening factor explaining why Dr.
 12 Williams's opinion testimony in 2011 did not apply to the
 13 relevant period 10 years earlier. (See also AR 509-10 (Dr.
 14 Anderson's assessment showing no mental or physical symptoms but
 15 noting that "what is somewhat unusual is the absence of long

16

17 ¹⁰ Plaintiff complains that the ALJ misstated Dr. Williams's
 treatment records to find that he had "no work restrictions" in
 18 2003. (See J. Stip. at 5-6.) But those were in fact his
 19 treating physicians' findings – albeit in workers'-compensation
 terms (see AR 366 (Aug. 22, 2003 note ("Work Status: No
 20 disability recommendation is made at this time")), 368 (Aug. 1,
 2003 note (stating "No changes in work restrictions, part-time
 21 only" under "Work Restrictions"))). The Kerlan-Jobe records show
 22 that Plaintiff was initially assessed as temporarily totally
 23 disabled for workers'-compensation purposes – meaning that at
 24 that time he had an "impairment reasonably expected to be cured
 25 or materially improved with proper medical treatment," Brooks v.
Workers' Comp. Appeals Bd., 161 Cal. App. 4th 1522, 1529-30 (Ct.
 26 App. 2008) – but subsequently was upgraded in late 2002 to
 27 temporarily partially disabled, meaning that he could resume work
 28 in some capacity, namely, part time. Moreover, the ALJ noted the
 "part time" restriction by Dr. Williams in August 2003 and then
 two sentences later stated that Dr. Williams "again" found that
 Plaintiff had "no work restrictions" in December 2003 and
 February 2004. (AR 27.) In context, Dr. Williams clearly meant
 that Plaintiff could still work part time.

1 acting opiates and since 9/07 the self cessation of all opiate
2 analgesic meds").) Citing findings from both Dr. Williams and
3 Dr. Anderson, the ALJ noted that as of December 2010, Plaintiff
4 was taking "Lyrica [an anti-epileptic medication that controls
5 seizures] for pain relief and [had] not tak[en] any narcotic pain
6 relief medication" since 2007. (AR 26.)

7 Lastly, any error was harmless because there was no material
8 difference between the ALJ's RFC and Dr. Williams's opinion.
9 Both the ALJ and Dr. Williams found that Plaintiff could no
10 longer work as an attorney or instructor. (Compare AR 29-30,
11 with AR 192-95.) The ALJ's RFC generally tracked Dr. Williams's
12 opinion at AR 210 that Plaintiff could work in jobs where he was
13 allowed to "change positions frequently," "sit when necessary
14 when he had intolerable pain or incapacitating pain," avoid "any
15 heavy lifting, any repetitive bending and rotation of the neck or
16 the lumbar spine," and have "some control over his environment .
17 . . [to] manage the symptoms of his spine disease." (Compare AR
18 27-28, with AR 194, 210.) Although Plaintiff claims that Dr.
19 Williams assessed some period of time during which Plaintiff
20 would be absent or "away from work because of pain flare-ups and
21 for treatment" and faults the ALJ for not including such a limit
22 in the RFC (J. Stip. at 4-5), he points to no such findings by
23 Dr. Williams in the record. Accordingly, any error was harmless.

24 B. The ALJ's RFC Finding Was Supported by Substantial
25 Evidence

26 Plaintiff contends that the ALJ's RFC finding failed to
27 include a limitation allegedly noted by the nonexamining medical
28 expert, Dr. Harvey Alpern, of likely "miss[ing] one day of work a

1 month." (J. Stip. at 9-12, 14.) The ALJ did not err.

2 1. Relevant background

3 The ALJ submitted posthearing medical questionnaires to Dr.
4 Anderson, a psychiatrist (AR 115), and Dr. Alpern, a cardiologist
5 (AR 107). Dr. Anderson found no mental impairments or
6 limitations "currently" or as of August 2001. (AR 515-16.) Dr.
7 Alpern completed two forms, the questionnaire and an attached
8 physical RFC assessment, both requiring him to respond "in the
9 context of the . . . more recent time period." (AR 498, 501.)
10 Dr. Alpern noted in the RFC assessment that Plaintiff's
11 functional limitations related back to 1998 but did not so
12 indicate as to his answers on the questionnaire. (AR 501, 508.)
13 Dr. Alpern assessed a variety of limitations on the RFC form.
14 When asked to state any other work activities that would be
15 affected by any impairments, he drew a line, indicating that
16 there were none. (See AR 508.)

17 On the questionnaire, Dr. Alpern described Plaintiff as
18 suffering from degenerative disc disease with symptoms of "pain."
19 (AR 498-500.) Dr. Alpern did not respond to the question, "how
20 many times per month, if any, would [Plaintiff]'s physical
21 impairments likely disrupt a regular work schedule that otherwise
22 accommodated all limitations identified [in RFC assessment]?"
23 (AR 501.) But he wrote "once" in response to the next question,
24 "how long would the average disruption last?" (Id.) Because no
25 other physician assessed Plaintiff's functional limitations for
26 the relevant period, the ALJ adopted Dr. Alpern's "most
27 restrictive limitations in the record" as Plaintiff's RFC. (AR
28 29.)

1 2. Analysis

2 Plaintiff's contention about Dr. Alpern's alleged one-day-a-
 3 month limitation lacks merit. Although the record is not
 4 entirely clear, Dr. Alpern likely meant to respond "once" to the
 5 first question, regarding the frequency of monthly work
 6 disruptions, not the second, concerning how long such a
 7 disruption would last. But "once" in the context of "how many
 8 times per month" means one "time" a month, not one "day," as
 9 Plaintiff suggests. Indeed, Dr. Alpern did not answer the
 10 question concerning how long that disruption would last, for a
 11 day or a minute.¹¹

12 Further, unlike the functional-assessment form, which Dr.
 13 Alpern clarified related back to Plaintiff's limitations in 1998,
 14 the questionnaire instructed Dr. Alpern to respond based on the
 15 "more recent time period." Thus, Dr. Alpern's once-a-month
 16 restriction applied to Plaintiff's then RFC, in 2013, which had
 17 likely worsened since 2007 because of Plaintiff's decision to
 18 stop taking pain medications. See § 404.1530(a) ("In order to
 19 get benefits, you must follow treatment prescribed by your
 20 physician if this treatment can restore your ability to
 21 work[.]"). Because Dr. Alpern left out that limitation in his
 22 RFC assessment even when he was asked to detail "any other
 23 limitations," he apparently did not mean for it to relate back to
 24 the relevant period before Plaintiff's date last insured. Thus,

25
 26 ¹¹ Indeed, Dr. Williams testified that Plaintiff's
 27 "escalation in pain" is "usually short in duration and self-
 28 limited," typically "occur[ring] over the course of one to two
 minutes" but sometimes "last[ing] for 20 or 30 minutes" before
 returning "back down to baseline." (AR 202.)

1 remand is not warranted.

2 C. The ALJ Properly Relied on the VE's Testimony

3 Plaintiff contends that the ALJ's decision must be reversed
 4 because he failed to resolve an apparent conflict between the
 5 VE's testimony and the DOT. (J. Stip. at 14-16, 19.) For the
 6 reasons discussed below, remand is not warranted.

7 1. Applicable law

8 To ascertain the requirements of occupations as generally
 9 performed in the national economy, the ALJ may rely on VE
 10 testimony or information from the Dictionary of Occupational
 11 Titles ("DOT"). SSR 00-4P, 2000 WL 1898704, at *2 (2000) (at
 12 steps four and five, SSA relies "primarily on the DOT (including
 13 its companion publication, the SCO) for information about the
 14 requirements of work in the national economy" and "may also use
 15 VEs . . . at these steps to resolve complex vocational issues");
 16 SSR 82-61, 1982 WL 31387, at *2 (1982) ("The [DOT] descriptions
 17 can be relied upon – for jobs that are listed in the DOT – to
 18 define the job as it is usually performed in the national
 19 economy." (emphasis in original)). "Neither the DOT nor the VE
 20 . . . automatically 'trumps' when there is a conflict." SSR 00-
 21 4P, 2000 WL 1898704, at *2; see also Johnson v. Shalala, 60 F.3d
 22 1428, 1435 (9th Cir. 1995) (noting that DOT "is not the sole
 23 source of admissible information concerning jobs" (alteration and
 24 citations omitted)).

25 When a VE provides evidence at step four or five about the
 26 requirements of a job, the ALJ has a responsibility to ask about
 27 "any possible conflict" between that evidence and the DOT. See
 28 SSR 00-4p, 2000 WL 1898704, at *4; Massachi v. Astrue, 486 F.3d

1 1149, 1152-54 (9th Cir. 2007) (holding that application of SSR
 2 00-4p is mandatory). When such a conflict exists, the ALJ may
 3 accept VE testimony that contradicts the DOT only if the record
 4 contains "persuasive evidence to support the deviation." Pinto
v. Massanari, 249 F.3d 840, 846 (9th Cir. 2001) (citing Johnson,
60 F.3d at 1435); see also Tommasetti v. Astrue, 533 F.3d 1035,
 7 1042 (9th Cir. 2008) (finding error when "ALJ did not identify
 8 what aspect of the VE's experience warranted deviation from the
 9 DOT").

10 The DOT provides no information regarding the availability
 11 of a sit/stand option or other need to shift positions during the
 12 workday for any of the jobs it covers. Thus, no actual conflict
 13 between the DOT and a VE's testimony concerning a sit/stand
 14 option exists. See Strain v. Colvin, No. CV 13-01973-SH, 2014 WL
 15 2472312, at *2 (C.D. Cal. June 2, 2014) (finding no conflict
 16 between sit/stand option and DOT because "the DOT simply does not
 17 address sit/stand options"). There is no controlling Ninth
 18 Circuit law regarding whether a conflict arises when the DOT is
 19 silent on a physical requirement, cf. DeLorme v. Sullivan, 924
 20 F.2d 841, 850 (9th Cir. 1991) (noting that "when a claimant must
 21 alternate periods of sitting and standing, the ALJ is directed to
 22 consult a vocational expert," but remanding on other bases),
 23 although an unpublished decision suggests as much, see
Buckner-Larkin v. Astrue, 450 F. App'x 626, 628-29 (9th Cir.
 24 2011) (finding that "conflict" between at-will sit/stand option
 25 and DOT was adequately addressed by VE based on VE's own research
 26 and experience).

28 District courts in the Ninth Circuit are divided on whether

1 a conflict exists for limitations not addressed by the DOT,
 2 including sit/stand options. Compare Strain, 2014 WL 2472312, at
 3 *2 (finding no apparent conflict between sit/stand requirement
 4 and DOT), Gilmour v. Colvin, No. 1:13-cv-00553-BAM, 2014 WL
 5 3749458, at *8 (E.D. Cal. July 29, 2014) (same), McBride v.
 6 Comm'r of Soc. Sec., No. 2:12-cv-0948-CMK, 2014 WL 788685, at *8
 7 (E.D. Cal. Feb. 25, 2014) (same), and Harvey v. Astrue, No.
 8 09-02038 CW, 2010 WL 2836817, at *14 (N.D. Cal. July 16, 2010)
 9 (same), with Lorigo v. Colvin, No. 1:13-CV-00405-SKO, 2014 WL
 10 1577317, at *11 (E.D. Cal. Apr. 18, 2014) (holding that VE's
 11 testimony "encapsulat[ing] a sit/stand option automatically
 12 deviated from the DOT"), Valenzuela v. Astrue, No. C 08-04001
 13 WHA, 2009 WL 1537876, at *3 (N.D. Cal. June 2, 2009) (finding
 14 "potential[]" conflict between sit/stand requirement and VE's
 15 testimony and remanding because ALJ did not ask whether VE's
 16 testimony was consistent with DOT), Smith v. Astrue, No. C
 17 09-03777 MHP, 2010 WL 5776060, at *12 (N.D. Cal. Sept. 16, 2010)
 18 (same), and Brown v. Astrue, No. 2:11-CV-0665 DAD, 2012 WL
 19 4092434, at *5-6 (E.D. Cal. Sept. 17, 2012) (same).

20 2. Analysis

21 This Court finds persuasive the line of cases holding that
 22 because the DOT is always silent concerning a sit/stand option,
 23 no actual conflict exists between the DOT and a VE's testimony
 24 about such a requirement. See, e.g., Strain, 2014 WL 2472312, at
 25 *2; Gilmour, 2014 WL 3749458, at *8. Rather, the VE's testimony
 26 "supplements" the DOT. See Herrera v. Colvin, No. ED CV
 27 13-1734-SP, 2014 WL 3572227, at *9 (C.D. Cal. July 21, 2014). As
 28 Defendant notes (J. Stip. at 18), to hold otherwise would mean

1 that VEs always create conflicts with the DOT whenever they
2 mention any of the multitude of things about a job not expressly
3 addressed in the DOT. Plaintiff correctly notes the lack of
4 controlling circuit precedent on this issue, but he misplaces his
5 reliance on Coleman v. Astrue, 423 F. App'x 754 (9th Cir. 2011).
6 (See J. Stip. at 15.) Coleman is not on point because the ALJ
7 there failed to ask the VE whether his testimony conflicted with
8 the DOT, and the Commissioner "concede[d]" that such error
9 violated Massachi, 486 F.3d at 1152. Coleman, 423 F. App'x at
10 756. Here, in contrast, the VE was asked to identify any
11 conflict between his opinion and the DOT, and he implicitly
12 confirmed that no such conflict existed concerning the sit/stand
13 option by listing and resolving a different conflict, regarding
14 the skill requirement of "gate guard." (See AR 227-28.) The
15 VE's specialized knowledge and expertise formed the necessary
16 foundation to support his explanation that no conflict existed as
17 to the sit/stand option. See Bayliss v. Barnhart, 427 F.3d 1211,
18 1218 (9th Cir. 2005). Courts have rejected claims based on
19 conflict – even at step five – when a DOT description does not on
20 its face conflict with the claimant's RFC if the VE's testimony
21 or the tasks described by the DOT confirm that the job would
22 accommodate the claimant's limitations. See, e.g., Guevara v.
23 Colvin, No. CV 12-01988 AGR, 2013 WL 1294388, at *7-8 (C.D. Cal.
24 Mar. 28, 2013); Huerta v. Astrue, No. EDCV 11-1868-MLG, 2012 WL
25 2865898, at *2 (C.D. Cal. July 12, 2012); McBride, 2014 WL

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1 788685, at *8. That is the case here.¹²

2 Accordingly, remand is not warranted on this basis.

3 **VI. CONCLUSION**

4 Consistent with the foregoing and under sentence four of 42
5 U.S.C. § 405(g),¹³ IT IS ORDERED that judgment be entered
6 AFFIRMING the decision of the Commissioner, DENYING Plaintiff's
7 request for remand, and DISMISSING this action with prejudice.

8

9 DATED: November 29, 2016

JEAN ROSENBLUTH

JEAN ROSENBLUTH

U.S. Magistrate Judge

21 ¹² Coleman is also readily distinguished because the
22 claimant there had to "switch between sitting, standing, and
23 walking at least briefly every hour," 423 F. App'x at 755,
24 whereas Plaintiff was able to sit, stand, or walk for two hours
25 each at a time (see AR 29 (adopting limitations at AR 504)) and
could perform each function for a total of six hours a day (AR
504). Thus, any conflict was less apparent than in Coleman.

26 ¹³ That sentence provides: "The [district] court shall have
27 power to enter, upon the pleadings and transcript of the record,
28 a judgment affirming, modifying, or reversing the decision of the
Commissioner of Social Security, with or without remanding the
cause for a rehearing."